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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Summary of Argument:	
Point I. The Circuit Court erred in deciding the merits herein without first concluding that it had jurisdiction of the action	4
Point II. *Heikkila* v. *Barber* should be reconsidered and overruled	7
(A) Historical Development	7
1. Nishimura Ekiu to Geigow	7
2. Lloyd Sabaudo to Heikkila	12
3. The Heikkila Case	14
(B) The Heikkila case should be reversed	15
1. Finality of immigration decisions does not preclude judicial review	16
2. Review is not precluded under Section 10 of the Administrative Procedure Act	18
3. The Legislative History of the 1952 Immigration Act reaffirms the conclusion that Declaratory Judgment is available	20
Point III. The hearing failed to comply with the immigration statute and was invalid	22
Point IV. The hearing was invalid for failure to comply with the Administrative Procedure Act	34
Point V. The hearing was unfair	38
Conclusion	41
Appendix A—Statutes and Regulations	42
Appendix "B"—Decision of Board of Immigration Appeals	47

CITATIONS

Cases:

	Page
Barnett v. *Mayes*, 43 F. 2d 521 (C.A. 10, 1930)	5
Bindczyck v. *Finucane*, 342 U.S. 76 (1951)	33
Bogiatzis v. *Hall*, 195 F. 2d 661, (C.A. 4, 1952)	38
Bridges v. *Wixon*, 326 U.S. 135 (1944)	11
Buschbaum & Co. v. *F.T.C.*, 153 F. 2d 85 (C.A. 7, 1946), 328 U.S. 819	40
Butler v. *Regents of the University*, 32 Wisc. 124 (1873)	26
C.A.B. v. *Modern Air Transport*, 179 F. 2d 622 (C.A. 2, 1950)	32
Chambers v. *Robertson*, 184 F. 2d 144 (C.A.D.C. 1950)	32
Chew v. *Colding*, 344 U.S. 590 (1953)	10
Chin Yow v. *United States*, 208 U. S. 8 (1908)	9, 10
Chin Wey v. *Wixon*, 4 F. 2d 247 (C.A. 1, 1925)	10
Democrat Printing Co. v. *Federal Communications Commission*, 202 F. 2d 298 (C.A.D.C.,1952)	32
Dong Ying Fun v. *Nagle*, 5 F. 2d 310 (C.A. 9, 1925)	25
Door v. *Donaldson*, 195 F. 2d 764 (C.A.D.C. 1952)	38
Estep v. *United States*, 327 U.S. 114 (1946)	11, 17, 19
Ex parte Lee Bock Fook, 40 F. Supp. 937, (S. D. Cal. 1941)	40
Ex parte Chin Shee, 1 F. 2d 798 (D. Mass. 1924)	10
Ex parte Keizo Kamiyama, 44 F. 2d 503 (C.A. 9, 1930)	39
Ex parte Sakaguchi, 277 F. 913 (C.A. 9, 1922)	11, 24
Ex parte Suzanna, 295 Fed. 713 (D. Mass. 1924)	11
Ex parte Tomimatsu, 232 Fed. 376 (N.D. Cal. 1916)	25
Ex parte Ver Pault, 86 F. 2d 113 (C.A. 2, 1936)	10
Federal Power Commission v. *Panhandle Co.*, 337 U.S. 498, (1949)	32
Fok Young Yo v. *United States*, 185 U.S. 296 (1902),	8, 15, 16
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893)	8, 15
Fowler et al. v. *Crown-Zellerbach*, 163 F. 2d 773 (C.A. 9, 1947)	33
Geigow v. *Uhl*, 239 U.S. 3 (1915)	10, 16, 17, 19

Page

General Broadcasting System v. *Bridgeport B. Station*, 53 F. 2d 664 (D. Conn. 1931) 29

Gin Soon Ging v. *Carmichael*, 123 F. 2d 72 (C.A. 9, 1941) 39

Gonzales v. *Williams*, 192 U.S. 1 (1904) 9, 32, 33

Gusik v. *Schilder*, 340 U.S. 128 (1950) 34

Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 14

Heikkila v. *Barber*, 345 U.S. 229 (1953) 3, 4, 6, 14

Heiliger v. *City of Sheldon*, 236 Iowa 146 (1945) 26

Heitmeyer v. *Federal Communications Commission*, 95 F. 2d 91 (C.A.D.C. 1937) 29

Hoey Lum Qung v. *Johnson*, 299 Fed. 246 (C.A. 1, 1924) 10

Hom Moon Ong v. *Nagle*, 32 F. 2d 470 (C.A. 9, 1929) 40

Hormel v. *Helvering*, 312 U.S. 552 (1941) 22

Johnson v. *Shaughnessy*, 336 U.S. 806 (1949) 11, 16

Johnson v. *Tertzag*, 2 F. 2d 40 (C.A. 1, 1924) 10

Joy v. *Hague*, 175 F. 2d 395 (C.A. 1, 1949) 5

Kessler v. *Strecker*, 307 U.S. 22 (1939) 11

King v. *Edward Hines' Lumber Co.*, 68 F. Supp. 1019 D. Oregon, 1946) 33

Kristensen v. *McGrath*, 179 F. 2d 796 (C.A.D.C. 1949) 11, 19

Kwock Jan Fat v. *White*, 253 U.S. 454 (1920) 38

Lee Lung v. *Paterson*, 186 U.S. 168 (1902) 9, 16

Lem Moon Sing v. *United States*, 158 U.S. 538 (1895) 8

Lloyd Sabaudo Societa Anonima v. *Elting*, 287 U.S. 329 (1932) 11, 12, 16

Lovell v. *City of Griffin*, 303 U.S. 444 (1938) 32

Manhattan Co. v. *Commissioner*, 297 U.S. 129 (1936) 28

Mansfield C. & L. M. R. Co. v. *Swan*, 111 U.S. 379 (1884) 5

Martinez v. *Neelly*, 197 F. 2d 462 (C.A. 7, 1952; No. 218, October Term, 1952) 14

Page

Masses Publishing Co. v. *Patten*, 244 Fed. 535 (S.D. N.Y. 1917) 11
McCrone v. *United States*, 100 F. 2d 322 (C.A. 9, 1938), affirmed 307 U.S. 61 (1939) 5
McGrath v. *Kristensen*, 340 U.S. 162 (1950) 11, 13, 16, 31
Mitchell v. *Metcalf*, 269 U.S. 514 (1926) 26
Montana Nat. Bank of Billings v. *Yellowstone Co.*, 276 U.S. 499 (1928) 32
National Discount Corp. et al. v. *O'Mell*, 194 F. 2d 452 (C.A. 6, 1952) 11
Ning v. *Brownell* (C.A. D.C. No. 11,496) 6
Nishimura Ekiu v. *United States*, 142 U.S. 651 (1892) 7
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 11
Pennsylvania R. Co. v. *International Coal Co.*, 230 U.S. 184, 197 (1913) 32
Perkins v. *Elg*, 307 U.S. 325 (1939) 16, 17
Prince v. *Commissioner*, 185 F. 2d 578 (C.A. 6, 1950) 20
Procter & Gamble Distributing Co. v. *Sherman*, 2 F. 2d 165, 167 (S.D.N.Y. 1924) 32
Public Utilities Comm. v. *United Fuel Gas Co.*, 317 U.S. 456 (1943) 32
Quon Quon Poy v. *Johnson*, 273 U.S. 352 (1926) 10
Rubinstein v. *Brownell*, 206 F. 2d 449 (C.A.D.C. 1953) 21
Skinner and Eddy Corp. v. *United States*, 249 U.S. 557 (1919) 28, 32
Smith v. *Cahoon*, 283 U.S. 553 (1931) 32
Stratton v. *St. Louis Southwestern R. Co.*, 282 U.S. 10 (1930) 29
Sherrer v. *Sherrer*, 344 U.S. 343 (1948) 33
S.S.W., Inc. v. *Air Transport Assn.*, 191 F. 2d 658 (C.A.D.C. 1951) 34
Sung v. *McGrath*, 339 U.S. 33 (1950) 36
The Japanese Immigrant Case, 189 U.S. 86 (1903) 9
Tucker v. *Alexander*, 275 U.S. 228 (1927) 33
United States v. *Corrick*, 298 U.S. 435 (1936) 5
United States v. *Cusson*, 132 F. 2d 413 (C.A. 2, 1942) 5
United States v. *Ju Toy*, 198 U.S. 253 (1905) 10

Page

United States v. *Maurice*, 2 Brock 96, 26 Fed. Cases No. 15,747 (C.C. Va., 1823) 25

United States v. *Powell*, 38 F. Supp. 183 (D.C.N.J. 1941) 11

United States v. *Sing Tuck*, 194 U.S. 161 (1904) 32

United States v. *Sotis*, 131 F. 2d 783 (C.A. 7, 1942) 33

U.S. ex rel Boxer v. *Tod*, 294 Fed. 628 (C.A. 2, 1923) 10

U.S. ex rel. Bradley v. *Watkins*, 163 F. 2d 328 (C.A. 2, 1949) 32

U.S. ex rel. Brandt v. *District Director*, 40 F. Supp. 371 (S.D.N.Y. 1941) 38

U.S. ex rel. Brugnoli v. *Tod*, 300 Fed. 913 (S.D.N.Y. 1923) 11

U.S. ex rel. De Lucia v. *O'Donovan*, 178 F. 2d 876 (C.A. 7, 1950) 32

U.S. ex rel. Duner v. *Curran*, 10 F. 2d 38 (C.A. 2, 1925) 10

U.S. ex rel. Errichetti, 39 F. Supp. 388 (E.D.N.Y. 1941) 11

U.S. ex rel. Fink v. *Tod*, 1 F. 2d 246 (C.A. 2, 1924) 10

U.S. ex rel. Fong Lung Sing v. *Day*, 37 F. 2d 36 (C.A. 2, 1930) 10

U.S. ex rel. Friedman v. *Tod*, 296 Fed. 888 (C.A. 2, 1924) 10

U.S. ex rel. Frisch v. *Miller*, 181 F. 2d 360 (C.A. 5, 1950) 36

U.S. ex rel. Georgian v. *Uhl*, 271 Fed. 676 (C.A. 2, 1921) 11

U.S. ex rel. Hadrosek v. *Shaughnessy*, 101 F. Supp. 432 (S.D.N.Y. 1951) 11

U.S. ex rel. Hom Yuen Jum v. *Denton*, 291 Fed. 905 (S.D.N.Y. 1923) 10

U.S. ex rel. Mantler v. *Commissioner*, 3 F. 2d 234 (C.A. 2, 1924) 11

U.S. ex rel. Minuto v. *Reimer*, 83 F. 2d 166 (C.A. 2, 1936) 25, 40

Page

U.S. ex rel. Ohm v. *Perkins*, 79 F. 2d 533 (C.A. 2, 1935) 40
U.S. ex rel. Pasciuto v. *Baird*, 39 F. Supp. 411 (E.D. N.Y. 1941) 11
U.S. ex rel. Pazos v. *Redfern*, 180 Fed. 500 (C.C.E.D. La. 1910) 30
U.S. ex rel. Saclarides v. *Shaughnessy*, 180 F. 2d 687 (C.A. 2, 1950) 36
U.S. ex rel. Singleton v. *Tod*, 290 Fed. 78 (C.A. 2, 1923) 11
U.S. ex rel. Soo Hoo Hong v. *Tod*, 290 Fed. 689 (C.A. 2, 1923) 10
U.S. ex rel. Trinler v. *Carusi*, 166 F. 2d 457 (C.A. 3, 1948) 19
U.S. ex rel. Volpe v. *Jordan*, 161 F. 2d 390 (C.A. 7, 1947) 33
Varney et al. v. *Warehime, et al.*, 147 F. 2d 238 (C.A. 6, 1945) 32
Whitty v. *Weedin*, 68 F. 2d 127 (C.A. 9, 1933) 11
Williams v. *North Carolina*, 325 U.S. 226 (1945) 33
Woon Sun Seung v. *Proctor*, 99 F. 2d 285 (C.A. 9, 1938) 39
Zacharias v. *McGrath*, 105 F. Supp. 421 (D.C. Dist. of Col., 1952; C.A.D.C. No. 11,578) 6
Zank v. *Landon*, 205 F. 2d 615 (C.A. 9, 1953) 4, 5

Statutes and Regulations:

Administrative Procedure Act, June 11, 1946 44
5 U.S.C. 1004 ..... 37, 44
5 U.S.C. 1006 ..... 36, 45
5 U.S.C. 1009 ..... 18, 46
5 U.S.C. 1010 ..... 34, 46
Declaratory Judgment Act, 28 U.S.C. 2201 ..... 18, 42
Immigration Act, February 15, 1917 42
8 U.S.C. 152, 39 Stat. 885 42
8 U.S.C. 153, 39 Stat. 887 ..... 7, 23, 43
8 U.S.C. 164, 39 Stat. 893 43
Immigration Act of December 28, 1945 ..... 22, 42
8 U.S.C. 232, 59 Stat. 659 42
National Labor Relations Act, 29 U.S.C. 160 (c) 32

Page

Rule 12, Rules of Civil Practice 33
Securities Act, 15 U.S.C. 77 (i) (a) 32
8 *Code of Federal Regulations* 43
60.27 ..... 35, 43
60.29 ..... 35, 44

Miscellaneous:

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Senate Document 747, 61st Cong., 3rd Sess., Vol. I, p. 32 (1911) 30
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vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The Court of Appeals affirmed the judgment of the District Court in a per curiam opinion (R. 13). The opinion of the District Court is reported at 103 F. Supp. 507 (R. 7).

Jurisdiction

The judgment of the Court of Appeals was entered on July 2, 1953. The jurisdiction of this Court is invoked

under 28 U. S. C. 1254(1). Certiorari was granted on October 19, 1953.

Questions Presented

1. In view of *Heikkila* v. *Barber*, 345 U. S. 229 (1953), did the courts below have jurisdiction to render a declaratory judgment in an exclusion proceeding where the order of exclusion was rendered and the action instituted prior to the effective date of the Immigration and Nationality Act of 1952 (66 Stat. 163)?

2. Where the Court of Appeals has serious doubt as to its jurisdiction, should it decide the merits of the controversy without deciding the issue of jurisdiction?

3. Should *Heikkila* v. *Barber*, *supra*, be reconsidered and reversed?

4. Where the Immigration Statute (8 U. S. C. 153) provides that a Board of Special Inquiry shall consist of three members selected from immigration officials, is an exclusion order entered by a three man board in which a clerk-stenographer participates as a board member valid?

5. Must such issue of the Board's composition be raised administratively and does the government waive its objection to failure to raise such issue administratively by its neglect to raise the issue prior to trial?

6. Is such a Board exempt from the separation of functions and independent hearing officer's provisions of the Administrative Procedure Act (5 U. S. C. 1004-c, 1010) upon the ground that it is a special statutory board exempt under 5 U.S.C. 1006-a?

7. May the personnel of such Board be changed during the course of the administrative hearings and was the Board's determination that petitioner was not the son of a veteran of World War II and therefore inadmissible to the United States under 8 U.S.C. 232 reached after a fair hearing?

Statement

Petitioner's complaint alleges that he is the blood son of Tom Wing, a World War II veteran and citizen of the United States and that he was admissible to the United States on November 28, 1947 when he arrived at San Francisco and sought entry as the alien son of a veteran pursuant to 8 U. S. C. 232. (R. 1) A three man board of special inquiry consisting of two immigrant inspectors and a clerk stenographer voted on February 24, 1949 to exclude petitioner. One inspector and the clerk stenographer were not present during the first day of hearing when petitioner testified. On appeal to the Board of Immigration Appeals the order of exclusion was affirmed. Petitioner sought a judgment declaring that his hearing before the board of special inquiry was unfair because of failure to comply with the Administrative Procedure Act, because of the composition of the board of special inquiry, because those who heard his testimony were not the same individuals who rendered the decision and because the order of exclusion was not supported by substantial evidence.

The courts below have ruled that the board of special inquiry was properly composed, that timely objection was not made administratively on this issue, that the Administrative Procedure Act was inapplicable, and that the hearing was fair and a determination of exclusion justified. Petitioner seeks reversal of a per curiam affirmance of the District Court's decision.

The case was argued in the Court of Appeals subsequent to this court's decision in *Heikkila* v. *Barber*, 345 U. S. 229 (1953). The Court of Appeals recognized that that decision "may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus." Nevertheless, without deciding the jurisdictional issue, the Court of Appeals affirmed on the merits.

Statutes and Regulations

The applicable statutes and regulations are set forth in Appendix "A" herein.

Summary of Argument

Petitioner contends that if *Heikkila* v. *Barber*, 345 U. S. 229 (1953) is to be followed, the Circuit Court should have remanded the cause for dismissal on jurisdictional grounds without deciding the merits herein. *Zank* v. *Landon*, 205 F. 2d 615 (C. A. 9, 1953). If *Heikkila* v. *Barber*, is not followed, then the courts below erred in sustaining the exclusion order herein because (1) petitioner was not accorded a hearing before three immigration officials as prescribed by the 1917 Immigration Act, (2) the hearing violated the Administrative Procedure Act which was applicable to the hearings conducted herein in 1948 and 1949, and (3) the hearing was unfair due to changes in the personnel of the board of special inquiry.

Point I

The Circuit Court Erred in Deciding the Merits Herein Without First Concluding That It Had Jurisdiction of of the Action.

1. The Court below, in assuming jurisdiction to decide the merits of the controversy herein, without deciding the jurisdictional issue, violated Rule 12(h) of the Rules of Civil Practice which provides:

> "* * * whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

See *Zank* v. *Landon*, 205 F. 2d 615 (C. A. 9, 1953), *infra*.

2. The decision below is in conflict with this court's decision in *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) and *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884). In the *Mansfield* case it was observed that:

> "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The decision of the court below in neglecting to pass upon the jurisdictional issue and in deciding the merits, was contrary to the aforementioned decisions of this Court.

3. The court below should have dismissed the action solely on the basis of lack of jurisdiction rather than the merits if jurisdiction did not exist. In deciding the merits and passing over the jurisdictional issue, the court below acted contrary to decisions in other circuits. *Joy* v. *Hague*, 175 F. 2d 395 (C. A. 1, 1949); *United States* v. *Cusson*, 132 F. 2d 413 (C. A. 2, 1942); *McCrone* v. *United States*, 100 F. 2d 322 (C. A. 9, 1938), affirmed 307 U. S. 61; *Barnett* v. *Mayes*, 43 F. 2d 521 (C. A. 10, 1930).

The prevailing rule which was not followed by the court below is expressed in *United States* v. *Cusson, supra*, a decision by Circuit Judge Learned Hand as follows: The appellate court

> "is always under a duty to examine its jurisdiction *ex mero motu* and can never properly undertake to pass upon the merits till it has done so."

4. In *Zank* v. *Landon*, 205 F. 2d 615 (C. A. 9, 1953) a declaratory judgment to review a deportation order was dismissed upon the merits in the District Court in December, 1952. After the decision of the Supreme Court in

Heikkila v. *Barber*, 345 U. S. 229 (March 16, 1953), upon motion of the *appellant*, the case was remanded to the District Court with directions to dismiss for lack of jurisdiction in accordance with Rule 12(h) of the Rules of Civil Practice.

Zacharias v. *McGrath*, 105 F. Supp. 421 (D. C. Dist. of Col., 1952) involved an alien excluded from readmission to the United States. His declaratory judgment action was terminated in the lower court, upon the grant of defendant's motion for judgment on the pleadings. No jurisdictional objection appears to have been raised in that court. Upon appeal to the Court of Appeals for the District of Columbia, the court remanded the cause for dismissal solely for lack of jurisdiction upon the authority of the *Heikkila* case. This action was taken in the Court of Appeals below subsequent to the decision herein. (See: *Zacharias* v. *McGranery*, C. A. D. C., No. 11,578). In the instant case, as in *Ning* v. *Brownell*, (C. A. D. C., No. 11,496), now pending undecided in the Court of Appeals, the position of the government has been that the cause should be dismissed for lack of jurisdiction, without deciding the merits, upon the authority of the *Heikkila* case.

5. It should be noted that *Heikkila* v. *Barber*, *supra*, a deportation case, arose upon a motion to dismiss for failure to join proper parties and failure to state a cause of action. In opposing the grant of an appeal to this Court, the Solicitor General noted at page 6 of his opposition (No. 426, October, 1952 Term) that "The question of the reviewability of deportation orders by actions other than habeas corpus is not involved in this case". Nevertheless, this Court held that habeas corpus was the exclusive remedy, indicating that this type of jurisdictional defect may be considered by the Court of its own motion and that it can not be waived. There can be no question that if declaratory

judgment actions may not be maintained prior to December 24, 1952 in deportation cases, that they may not be recognized in exclusion cases where, as here, they were filed prior to the 1952 Immigration and Nationality Act (66 Stat. 163). The Attorney General's decision in an exclusion case (8 U. S. C. 153, Appendix "A", herein) is just as final under the 1917 Immigration Act as his deportation order.

Point II

Heikkila v. Barber Should Be Reconsidered and Overruled.

It would make the task of counsel much simpler, to seek reversal of the decision below upon jurisdictional grounds. Were they to so confine themselves, they would compromise their intellectual honesty and forsake their trust as officers of this Court. We believe that the *Heikkila* case inadequately presented to this Court both in briefs and in oral argument the jurisdictional issue presented herein. We respectfully submit, that the opinions in the *Heikkila* case completely overlook the evolution of judicial review of immigration cases in this Court over the span of the last fifty years. It is due to the conflict between *Heikkila* and landmark cases in the history of this Court, that counsel seek reconsideration of the jurisdictional issue herein.

(A) Historical Development

1. *Nishimura Ekiu to Giegow*

The early immigration cases, some of which involved constitutional attacks upon the substantive provisions of our immigration laws, would deny access to the courts to aliens ordered deported and excluded.

Nishimura Ekiu v. *United States*, 142 U. S. 651 (1892) declared that an alien excluded as a public charge could not seek judicial intervention and:

> "be permitted to enter in opposition to the *constitutional and lawful* measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive and administrative officers *acting within powers expressly conferred by Congress*, are due process of law". (Italics supplied.)

Fong Yue Ting v. *United States*, 149 U. S. 698 (1893) upheld the constitutionality of a deportation statute which required the removal of domiciled Chinese laborers unable to produce certificates of residence or establish lawful residence by at least one credible white witness. Justices Brewer, Field and Fuller recorded notable dissents to a decision which deprived aliens of procedural due process. The majority invoked the absolute power of Congress to exclude or deport, saying:

> "The question whether and upon what conditions these aliens shall be permitted to remain in the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Lem Moon Sing v. *United States*, 158 U. S. 538 (1895) through Mr. Justice Harlan reaffirms the right of Congress to exclude any and all aliens "without judicial intervention." Mr. Chief Justice Fuller repeats this conclusion in an exclusion case, *Fok Young Yo* v. *United States*, 185 U. S. 296 (1902). However, he first acknowledges that judicial intervention may be required by treaty, statute, or the Constitution before stating that:

> "Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for

many years the recognized and declared policy of the country."

Lee Lung v. *Paterson,* 186 U. S. 168 (1902) reaffirms the finality of an executive decision, even though it might be contrary to law. The court said:

> "* * * we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

However, in *Gonzales* v. *Williams,* 192 U. S. 1 (1904) an attempt to exclude a Puerto Rican was considered reviewable since he was not an alien.

Prior to the Immigration Act of 1907, (34 Stat. Pt. 1, 899) deportation was restricted to those who entered the United States unlawfully. It was a form of delayed exclusion. One is not surprised, therefore, to find similar expressions in deportation cases. *The Japanese Immigrant Case,* 189 U. S. 86 (1903) relying upon exclusion and deportation cases, declares that Congress may commit deportation decisions to the executive without judicial intervention but it cautions that the Supreme Court "has never held nor must we now be understood as holding, that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

Citizenship claimants soon tore down the barrier of finality of executive action and the refusal of judicial intervention. Mr. Justice Holmes refused to give absolute finality to executive action of exclusion in *Chin Yow* v. *United States,* 208 U. S. 8 (1908) unless a fair administrative hear-

ing had been granted.[1] In *Geigow* v. *Uhl*, 239 U. S. 3 (1915) the barrier was completely removed. Geigow, like Miss Eiku, was excluded upon the ground that he was likely to become a public charge. Solicitor General Davis argued that an adverse administrative decision was final and unreviewable. Mr. Justice Holmes answered:

> "The Courts are not forbidden by the statute to consider whether the reasons, when they are given agree with the requirements of the Act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* v. *United States*, 142 U. S. 651 * * * relied on by the government."

Geigow v. *Uhl*, *supra*, became a landmark decision, not only in exclusion[2] and deportation[3] cases but also in other

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[1] In the earlier case of *United States* v. *Ju Toy*, 198 U.S. 253 (1905) Justice Holmes upheld exclusion of an American citizen by executive decision without a judicial trial upon the theory that such "decision is due process of law." See comment by *Prof. Hart*, 66 *Hazvard Law Review* 1389. In accord with *Chin Yow* v. *United States* are *Tang Tun* v. *Edsell*, 223 U.S. 673 (1911) and *Quon Quon Poy* v. *Johnson*, 273 U.S. 352 (1926). Compare, *Chew* v. *Colding*, 344 U.S. 590 (1953).

[2] *Ex parte Ver Pault*, 86 F. 2d 1113, 116 (C.A. 2, 1936); *U.S. ex rel. Fong Lung Sing* v. *Day*, 37 F. 2d 36, 37 (C.A. 2, 1930); *Johnson* v. *Keating*, 17 F. 2d 50, 51 (C.A. 1, 1926; *U.S. ex rel. Duner* v. *Curran*, 10 F. 2d 38, 41 (C.A. 2, 1925); *Chin Wey* v. *Wixon*, 4 F. 2d 247, 248 (C.A. 1, 1925); *Johnson* v. *Tertzag*, 2 F. 2d 40, 41, (C.A. 1, 1924); *Ex parte Chin Shee*, 1 F. 2d 798 (D.C. Mass. 1924); *U.S. ex rel. Fink* v. *Tod*, 1 F. 2d 246, 258 (C.A. 2, 1924); *Hoey Lum Qung* v. *Johnson*, 299 Fed. 246, 248 (C.A. 1, 1924); *U.S. ex rel. Friedman* v. *Tod*, 296 Fed. 888, 890 (C.A. 2, 1924); *U.S. ex rel Boxer* v. *Tod*, 294 Fed. 628, 633 (C.A. 2, 1923); *U.S. ex rel. Hom Yuen Jum* v. *Denton*, 291 Fed. 905, 906 (S.D.N.Y. 1923); *U.S. ex rel. Soo Hoo Hong* v. *Tod*, 290 Fed. 689, 695 (C.A. 2,

phases of administrative law. It was followed with complete approval by this Court in *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922—Justice Brandeis); *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 335 (1932—Justice Stone); *Kessler* v. *Strecker*, 307 U. S. 22, (1939—Justice Roberts); and *Estep* v. *United States*, 327 U. S. 114 (1946—Justice Douglas). Without citing the *Geigow* case, this Court followed its reasoning in *Bridges* v. *Wixon*, 326 U. S. 135 (1944); *Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949); and *McGrath* v. *Kristensen*, 340 U. S. 162 (1950). The decision found approbation in selective service cases [*Estep* v. *United States, supra; United States* v. *Powell*, 38 F. Supp. 183, 189 (D.C.N.J., 1941); *U. S. ex rel. Errichetti*, 39 F. Supp. 388, 380 (E.D.N.Y., 1941); *U. S. ex rel. Pasciuto* v. *Baird*, 39 F. Supp. 411, 414 (E.D.N.Y., 1941)] in post office cases [*Masses Publishing Co.* v. *Patten*, 244 Fed. 535, 537 (S.D. N.Y., 1917)] and in cases of body execution for civil debt [*National Discount Corp. et al.* v. *O'Mell*, 194 F. 2d 452, 456 (C.A. 6, 1952)].

Moreover, note should be made of the fact that when Congress enacted the 1917 Immigration Act (39 Stat. 874), it was not only aware of *Geigow* v. *Uhl*, decided two years before, but it also specifically referred to the case in treating with the subject of public charges (*Senate Report 352*, 61st Cong., 1st Sess., p. 5).

1923); *Ex parte Sakagushi*, 277 Fed. 913, 916 (C.A. 9, 1922); *U.S. ex rel. Hadrosek* v. *Shaughnessy*, 101 F. Supp. 432, 435 (S.D.N.Y. 1951).

[3] *Kristensen* v. *McGrath*, 179 F. 2d 796, 799 (C.A.D.C. 1949); *Whitty* v. *Weedin*, 68 F. 2d 127, 130 (C.A. 9, 1933); *U.S. ex rel. Mantler* v. *Commissioner*, 3 F. 2d 234, 236 (C.A. 2, 1924); *U.S. ex rel Brugnoli* v. *Tod*, 300 Fed. 913, 915 (S.D.N.Y. 1923); *Ex parte Suzanna*, 295 Fed. 713, 714 (D. Mass. 1924); *U.S. ex rel. Singleton* v. *Tod*, 290 Fed. 78, 81 (C.A. 2, 1923); *U.S. ex rel. Georgian* v. *Uhl*, 271 Fed. 676, 677 C.A. 2, 1921).

2. *Lloyd Sabaudo to Heikkila*

Lloyd Sabaudo Societa Anonima v. *Elting, supra,* involved an action seeking to recover immigration fines imposed upon landing an excludable alien. In speaking for the Court, Justice Stone summarized the law as it has existed for the last quarter of a century. He said:

> "The action of the Secretary is, nevertheless subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority, compare *Gonzales v. Williams,* 192 U. S. 1, *Geigow v. Uhl,* 239 U. S. 3, whether there was any evidence before him to support his determination, compare *Vajtauer v. Commission of Immigration,* 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat v. White,* 253 U. S. 454, *Tang Tun v. Edsell,* 223 U. S. 673; *Chin Yow v. United States,* 208 U. S. 8, 12; *The Japanese Immigrant Case,* 189 U.S. 86, 100, 101. * * * "

On May 17, 1940, Professors Marshall E. Dimock of the University of Chicago, Henry M. Hart of Harvard and John McIntire of George Washington University completed a comprehensive two year study of immigration practices for the Secretary of Labor who was then in charge of the Immigration and Naturalization Service. Their report, entitled the *Secretary of Labor's Committee on Administrative Procedure—The Immigration and Naturalization Service,* describes the evolution of judicial review from 1892 through *Geigow* v. *Uhl* and particularly the declaration of Justice Stone as follows:

> "This statement represents nothing less than a transformation in judicial doctrine when compared with the doctrines enunciated in the *Nishimura Ekiu, Fong Yue*

> *Ting* and immediately succeeding cases. Beginning with a conception of the immigration agencies as independent tribunals possessing substantially final authority with respect to all matters of construction and application of the immigration laws, the Court has swung around to a conception of them as, in effect, subordinate tribunals—entrusted, to be sure, with a wide range of discretion but subject to pervasive control by the courts. The powers attributed to executive officers in the early decisions were justified as resulting from the peculiarly absolute power of Congress over the admission and expulsion of aliens. Yet the powers attributed to them in Mr. Justice Stone's statement in the *Elting* case are not materially greater than the powers admittedly possessed by many administrative agencies over essential interests of citizens. And the restraints to which they are declared to be subject are not materially less." (p. 45)

As noted above, the *Geigow* and *Elting* cases remained impregnable and were followed without question in *Kessler* v. *Strecker, Estep* v. *United States, Bridges* v. *Wixon, Johnson* v. *Shaughnessy,* and *McGrath* v. *Kristensen.*

It was in *McGrath* v. *Kristensen,* 340 U. S. 162 (1950), that the Department of Justice revived the thirty-five year old rejected contention of Solicitor General Davis made in 1915 in the *Geigow* case. In attempting to defeat an action for declaratory judgment in a deportation case, it contended that the finality of the Attorney General's decisions in immigration cases, precluded review except in habeas corpus (Government's Brief, No. 34, October, 1950, Term, pp. 24 *et seq.*). The argument was rejected by seven members of this Court who said through Mr. Justice Reed at pages 168-169:

> "• • • the Government does contend that the Immigration Act provision, §19(a), making the Attorney General's decision on deportation 'final' precludes judicial review except by habeas corpus of his refusal

> to grant suspension of deportation. * * * Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U.S.C. §1331 and the terms of the Declaratory Judgment Act, 28 U.S.C. §2201."

The deportation cases of *Mascitti* and *Coleman* (Nos. 206, 264, October Term, 1951) came to this Court in actions for declaratory judgments and were decided on the merits in *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952) over objections of the Government that decisions of this character were unreviewable (Brief, pp. 57 *et seq.*). *Martinez* v. *Neelly*, 197 F. 2d 462 (C.A. 7, 1952), was a declaratory judgment which was decided adversely to the alien on the merits in the courts below. In this Court, the Government again asserted in briefs and oral argument that habeas corpus was the exclusive method of review (Brief, pp. 18 *et seq.*, No. 218, October Term, 1952). In a four to four decision, this Court affirmed without opinion, thus upholding the decision in the Government's favor on the merits. 344 U. S. 916 (1953).

3. *The Heikkilla Case*

In *Heikkila* v. *Barber*, 345 U. S. 229 (1953), the declaratory judgment action to review a deportation order was dismissed upon the merits in the district court. In this Court, as noted above, the Government at first declared that no question was raised as to the exclusiveness of habeas corpus. The issue was not covered in the alien's main brief. The Government's main brief merely incorporated its *Martinez* case argument by reference. A reply brief, hastily drafted, inadequately attempted to rebut the argu-

ment that declaratory judgment was not maintainable. Oral argument in this Court was as cursory on this issue as the treatment of the subject in the briefs of both sides.

It is therefore not too surprising, that the *Heikkila* case completely overlooked some fifty years development of judicial review in immigration cases. Reverting to *Fong Yue Ting* and *Fok Young Yo*, the Court declared at 345 U. S. 234-235:

> "During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. * * * And by 1901, Mr. Chief Justice Fuller was able to describe as 'for many years the recognized and declared policy of the country' the congressional decision to place 'the final determination of the right of admission in executive officers, without judicial intervention.' * * * Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the decisions have continued to regard this point as settled."

(B) The Heikkila Case Should Be Reversed

The incorrect premise of the Heikkila case is that judicial intervention in immigration cases is permissible only in habeas corpus because that remedy evolved solely to test rights protected by the constitution. Rights not under constitutional safeguards, would not be entitled to judicial assistance. If this be the law, then our immigration officials may violate the law and abuse their discretion without judicial intervention—provided they remain within the bounds of the constitution. This is not true in other phases of administrative law. Why should such a novel doctrine prevail here?

The *Heikkila* case reverts back to 1902 when the Supreme Court in *Fok Young Yo* v. *United States,* 185 U. S. 296, and *Lee Lung* v. *Paterson,* 186 U. S. 168, refused to review errors of law for excluded aliens. *Geigow* v. *Uhl,* 239 U. S. 3 (1915), and the thirty-five years of development which followed have been completely overlooked. No constitutional rights were involved in the *Geigow* case, and yet this Court intervened to correct an error of law. When this Court demanded fair procedures in compliance with applicable regulations for Miss Johnson, an excluded alien, no constitutional mandate was involved (*Johnson* v. *Shaughnessy,* 336 U. S. 806). Judicial intervention was not required by the constitution in *McGrath* v. *Kristensen,* 340 U. S. 162 (1950) nor was the constitution invoked to reject the Government's argument that habeas corpus was the exclusive remedy. In assuming jurisdiction of declaratory judgment actions in the *Martinez* and *Harisiades* cases, this Court conformed to the developments in administrative law and immigration cases from *Geigow* to *Kristensen.*

1. *Finality of immigration decisions does not preclude judicial review*

Ever since the *Geigow* and *Elting* cases, the finality of immigration decisions has not precluded judicial review to determine whether the administrative action contravened the constitution, the statute, or whether it was reached without a fair hearing or supporting evidence. *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329 (1932).

Judicial review of cases governed by a statutory declaration of finality is not limited to habeas corpus. Depending upon the nature of the case, and the available judicial techniques, review may otherwise be had, *e.g., Lloyd Sabaudo Societa Anonima* v. *Elting, supra* (review in an immigration case by suit to recover fines); *Perkins* v. *Elg,* 307 U. S. 325 (1939) and *McGrath* v. *Kristensen,* 340 U. S. 162 (1944)

(review in deportation cases by declaratory judgment actions); *Estep* v. *United States*, 327 U. S. 114 (1946) (review in selective service case by defense of improper classification in criminal trial).

Mr. Justice Holmes in the *Geigow* case, involving an excluded alien, declared that finality under our immigration statutes meant "conclusiveness upon matters of fact" only. Thus, it is clear that the finality involved in immigration decisions under the 1917 Immigration Act is effectuated when judicial review is restricted to the *type of issues* historically deemed proper for the court—*matters of law*, to use a shorthand expression. Such *finality* is not concerned with the method of obtaining review, since obviously review in declaratory judgment actions can be as strictly limited in scope as review in habeas corpus—to naked questions of law. The Government's finality argument restricting review to habeas corpus was rejected in the *Kristensen* case, and it was decided that a cause ripe for declaratory judgment had been established. *McGrath* v. *Kristensen, Perkins* v. *Elg, Geigow* v. *Uhl*, can not remain as controlling law at the same time with *Heikkila* v. *Barber*. If finality of immigration decisions preclude judicial review, it matters not whether review be in habeas corpus or declaratory judgment and it matters not whether the issue be one of eligibility to citizenship or excludability.

Thus, is thrown in bold relief the error of the *Heikkila* case. From any legitimate viewpoint of administrative finality, it matters not one whit whether a narrow issue of law be reviewed by habeas corpus or by the more civilized method of a declaratory judgment action. The latter permits adjudication of an issue of law on behalf of a person like the petitioner, concededly of good character and of law-abiding habits, without the necessity of arrest, confinement and severance from his family, friends and employment.

2. *Review is not precluded under Section 10 of the Administrative Procedure Act.*

Apart from actions under the general Declaratory Judgment Act (28 U. S. C. 2201) which authorized review in an immigration case in the *Kristensen* case, the Administrative Procedure Act's Section 10 (5 U. S. C. 1009) authorizes the maintenance of the action herein.

Section 10 provides:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (f) Form and Venue of Action—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction or *habeas corpus*) in any court of competent jurisdiction. • • •"

It is clear from the wording of Section 10 (b) of the Administrative Procedure Act that habeas corpus is one form of judicial review. Concededly, habeas corpus is available to test improper administrative action in immigration cases. How then can it be said that the immigration statutes preclude judicial review, when habeas corpus, a form of judicial review under the Administrative Procedure Act is available? When this is considered against the background of the Act, the answer becomes clearer.

"Very rarely do statutes withhold judicial review," and to "preclude judicial review under this bill a statute if

not specific in withholding such review, must on its face give clear and convincing evidence of an intent to withhold it" are the two guiding principles enunciated by the framers of the Administrative Procedure Act. (*Senate Document, No. 248,* 79th Cong., 2d Sess., 212, 275.) In *Estep* v. *United States,* 327 U. S. 114, the immigration decisions including *Geigow* v. *Uhl* were cited as examples of the types of cases where judicial review was not precluded even though Congress was silent upon the subject.

Section 10, read against this background, permits and authorizes judicial review in immigration cases. The single exception to Section 10(b) is where there is some adequate "special statutory review proceeding," i.e., those "wholly created by statute." (*Senate Document, 248, supra,* pp. 212-213, 276.) But no *special statutory proceeding* is provided for the review of immigration decisions and of course, habeas corpus is not a "special statutory review proceeding." It is not even mentioned in the 1917 Immigration Act. In enacting Section 10, Congress observed:

> "• • • The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." (*Senate Document, 248, supra.*)

Obviously, if a declaratory judgment action to determine the validity or application of agency action is proper before the statutory form of review, *a fortiori,* such form of action is proper where no statutory review proceeding exists. Thus, by Section 10's inescapable mandate, a declaratory judgment action may be maintained in immigration cases. And, the lower courts which have exhaustively considered this problem, have reached a similar conclusion. *U. S. ex rel, Trinler* v. *Carusi,* 166 F. 2d 457 (C.A. 3, 1948); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C.A. D.C. 1949);

Prince v. *Commissioner*, 185 F. 2d 578 (C.A. 6, 1950). We submit that these decisions should be followed.

3. *The Legislative History of the 1952 Immigration Act reaffirms the conclusion that Declaratory Judgment is available.*

This case is controlled by the 1917 Immigration Act which was in force when the action was instituted. It is pertinent, however, to review the legislative history of the 1952 Immigration Act (66 Stat. 163; 8 U. S. C. A. 1101, *et seq.*), effective December 24, 1952, as it reveals the Congressional understanding of this subject. That history shows quite clearly, that representatives of the American Bar Association, one of the militant proponents of the Administrative Procedure Act, believed that the early drafts of the McCarran-Walter Act would eliminate *existing* judicial review under Section 10 of the Administrative Procedure Act. The final version of the McCarran-Walter Act, was therefore brought in line to conform with Section 10—the law as it prevailed prior to December 24, 1952.

(a) S. 716 and H. R. 2379 of the 81st Congress, 1st Session were the first of a series of bills which later became the 1952 Immigration Act. Section 106 of these bills permitted no judicial review of findings of fact or of discretion. Determinations of law were "not to be subject to review by any court except through the writ of habeas corpus." Several organizations including the American Bar Association objected to these provisions of Section 106. The American Bar Association representative testified:

> "We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act." *Joint Hearings before the Sub-Committees of the Committees of the Judiciary on S. 716, H. R. 2379, H. R. 2816*, pp. 536-537.

Thereafter Section 106 was eliminated.

(b) In *House Report 1365* (82nd Congress, 2nd Session) p. 28, reporting out the 1952 Immigration Act, the House Committee announced that the bill "safeguards judicial review."

(c) *Conference Report 2096* (82nd Congress, 2nd Session), p. 127, on the 1952 Immigration Act declares:

> "Having extensively considered the problem *of judicial review, the conferees are satisfied that procedures provided in the bill . . . remain within the framework and the pattern of the Administrative Procedure Act.*" (Italics supplied.)

(d) When the bill was debated on the floor of the House of Representatives, Congressman Francis Walter, co-author of the bill and the Administrative Procedure Act declared (98 Cong. Rec., Daily Edition, 4483):

> "*Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned,* but it is not final in that it is not the last remedy that the alien has. *Section 10 of the Administrative Procedure Act is applicable.*" (Italics supplied.)

See also: *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A. D.C., 1953).

Thus, it appears, that when Congress enacted the McCarran-Walter Act, its sponsors, who were also the sponsors of the Administrative Procedure Act, believed that administrative finality in immigration matters did not preclude judicial review. Significantly, the finality provisions of the McCarran-Walter Act (66 Stat. 200, 210; Sections 236-c and 242-b) are worded precisely the same as the finality provisions of earlier immigration statutes because Congress believed that judicial review of immigration matters *remained within the framework* of Section 10 of the

Administrative Procedure Act where it had always been since 1946, when that Act became law.

Point III

The Hearing Failed to Comply with the Immigration Statute and Was Invalid

If the Court sustains the jurisdiction of the courts below, then the merits of the controversy become important. In seeking certiorari, petitioner assumed that the *Heikkila* case was controlling, that this Court might not desire to reexamine the doctrine of that case so soon, and that it might even reverse the Court of Appeals below without hearing oral argument, upon the basis of the *Heikkila* doctrine. Accordingly, the petition herein while making mention of the merits, devoted itself to the jurisdictional issue. The Government on the other hand in opposing certiorari devoted itself exclusively to the merits. It was only when this Court granted certiorari and set this matter down for oral argument, that counsel realized that reexamination of *Heikkila* might be warranted.

Under these circumstances, should *Heikkila* be reversed, it would be in the interests of justice to consider the merits herein, which may otherwise be before the Court by reason of the Government's argument in opposition to certiorari. This Court will in the interests of justice consider new issues not raised below. *Hormel* v. *Helvering*, 312 U. S. 552, 556-559 (1941). In considering the merits herein, the Court need not go so far, as the merits were considered below and raised by the Government in this Court.

Petitioner seeks admission to the United States as the alien son of an American Veteran of World War II. If he is the son of Tom Wing, a citizen and a veteran, he is entitled to entry to our shores pursuant to 8 U. S. C. 232

which waives documentary, quota, and physical requirements of the immigration laws for such aliens who apply for admission between December 28, 1945 and December 28, 1948.

Petitioner sought admission to the United States upon his arrival on November 27, 1947 (R. 2). He was accorded a hearing before a three-man Board of Special Inquiry on January 22, 1948 at San Francisco where permanent Boards of Special Inquiry are stationed (R. 2). At this hearing the Board of Special Inquiry was composed of:

Inspector, L. H. Sinclair, Chairman;
Acting Inspector, Paul Armstrong;
Secretary-Stenographer, Luba Brondz, Member.

A resumed hearing was held on February 24, 1949 at which time no evidence was adduced other than the introduction of 7 exhibits. The following changes occurred in the composition of the Board (Immigration File of Petitioner, lodged with the courts below, Minutes pp. 1, 2, 3, 24, 25):

Inspector Henry Hamm replaced Inspector Paul Armstrong; M. Louise Elliott, Clerk-Stenographer, replaced Luba Brondz as Board Member and Secretary.

Inspector Sinclair who alone heard all the evidence and participated in the vote to exclude, Inspector Hamm and Clerk-Stenographer Elliott both of whom heard no evidence whatsoever, voted unanimously to exclude petitioner. On February 24, 1949 the minutes of both hearings were certified by M. Louise Elliott as "Clerk-Stenographer", (her civil service classification).

(A) The Board was improperly composed

The immigration statute (8 U. S. C. 153) provides that a Board of Special Inquiry "shall consist of three members, who shall be selected from such of the immigration officials in the service as the Commissioner of Immigration and

Naturalization with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards." When permanent Boards are not maintained, then "government officials and or other persons shall be eligible for service on such boards."

The regulations (8 C.F.R. 60.29) issued under the statute provide that (1) immigrant inspectors, (2) all other employees assigned to act as secretaries of boards of special inquiry and (3) other persons (preferably government employees) may serve as members of a Board of Special Inquiry.

In the instant case, it is admitted that permanent Boards of Special Inquiry were warranted and maintained at San Francisco (R. 4). Reading the regulations in conjunction with the statute it is clear that the Board of Special Inquiry must be composed of *immigrant officials* where permanent boards of special inquiry are maintained as was the case here in San Francisco where the appellant arrived. The only type of immigrant official designated by the regulations are "immigrant inspectors or those designated as immigrant inspectors."

The statutes and regulations permit the utilization of other government employees including secretaries or stenographers only where there is no permanent Board of Special Inquiry. Such is not the case at the Port of San Francisco. Thus in *Ex parte Sakaguchi*, 277 Fed. 913 (C.A. 9, 1922) it was assumed that permanent boards were not warranted and that a stenographer was authorized under the phrase "other persons".

In *Ex parte Sakaguchi*, the Ninth Circuit Court of Appeals said at pages 914-915:

> "We may assume from the record that in the opinion of the Secretary of Labor the maintenance of a permanent Board of Special Inquiry for service at Seattle was not warranted, that it was impracticable to detail

regularly constituted boards from other stations for temporary service at that port, and that in pursuance of the authority conferred upon him by section 17, the Secretary authorized the creation of a board of inquiry at that port, and determined that the two immigration inspectors and the stenographer should be eligible for service on the board, *the stenographer* being included in the *term "other persons" as used in the statute.* Nothing appears in the record to show that these assumptions are not justified. Such being the case, we find no ground for holding that the board was not legally constituted." (Italics supplied.)

On the other hand, *U. S. ex rel Minuto* v. *Reimer*, 83 F. (2d) 166 (C.A. 2, 1936) following the district court decision in *Ex parte Tomimatsu*, 232 Fed. 376 (N.D. Cal. 1916) decided without detailed analysis that an immigration clerk may be designated as an immigration official and act as a member of a board of special inquiry at the port of New York. The decision does not indicate whether permanent boards were then stationed at New York. It should be noted that *Ex parte Tomimatsu* (N. D. Calif., 1916) *supra*, is qualified by the Ninth Circuit ruling in the *Sakaguchi* case. In *Dong Ying Fun* v. *Nagle*, 5 F. (2d) 310 (C.A. 9, 1925), the objection here raised was not presented. There the objection was to the fairness of having a stenographer act in a dual capacity—not to her qualifications under the statute.

Significantly 8 U. S. C. A. 108, 109 *contrasts clerks* with immigration officers and officials and it is submitted that a clerk-stenographer is not an immigrant official under the statute.

In *United States* v. *Maurice*, 2 *Brock.* 96, 26 Fed. Cases No. 15,747 (C.C. Va. 1823) Mr. Justice Marshall said:

> "Although an office is an employment, it does not follow that every employment is an office."

Mitchel v. *Metcalf*, 269 U. S. 514 (1926) held that a consulting engineer was not an officer under the War Revenue Act of 1917 and *Butler* v. *The Regents of the University*, 32 Wisc. 124 (1873) held that a professor in a state university was not considered a public officer.

Heiliger v. *City of Sheldon*, 236 Iowa 146, 154, 155 (1945) properly analyzes the problem as follows:

> "The term 'public officer' or 'public official' has received broad, narrow, and widely varying definitions, by numerous courts. One may find a definition which will fit almost any particular instance * * *. 'As before stated, in the several relations in which they are used, different elements may be involved. Therefore, in order to determine the meaning of these words in a given case regard must be had to the intent and subject matter of the law wherein they are employed. In ascertaining their meaning technical rules should be avoided, and courts should not be too precise in seeking for words and definitions' 2 McQuillin Municipal Corporations, sect. 436 * * * Among the essentials of public office there noted are the delegation to the office and its occupants of some of the sovereign functions, powers, duties, and trusts of government, the authority to direct, supervise, to perform duties with more or less independence of superior control. There is entrusted to the office and the officer a portion of the sovereign power of government."

In 42 *American Jurisprudence* 882, 889, 890, the following observations are made about public officials:

> "The duties must not be merely clerical, or those only of an agent or servant but must be performed in the execution or administration of the law, in the exercise of power and authority bestowed by law.
>
> * * *
>
> But there is a distinction between public office and public employment, which is not always clearly marked

by judicial expression and is frequently shadowy and difficult to trace. * * * Although every public office may be an employment, every public employment is not an office and the word 'employee' as used in statutes has in many cases been construed as not including officers."

Boards of Special Inquiry consist of three members since the Act of March 3, 1903 (32 Stat. pt. 1, p. 1213). Previously under the Act of March 3, 1893 (27 Stat. 570) "four officials acting as inspectors would comprise the Board" and a vote of three was necessary for admission of the alien. *Clark, Boards of Special Inquiry, Monthly Review, Immigration and Naturalization Service*, March 1952, p. 116. Thus historically, it was contemplated since 1903 that three immigrant inspectors rather than four sit in judgment in every exclusion case where practical.

As early as 1911, complaint was made with reference to the personnel of the Board.

"The boards exercise a power which if not properly used may result in injustice to the immigrant or, through the admission of undesirable aliens, in harm to the country. It is important, therefore, that these boards should be composed of unprejudiced men of ability, training and good judgment." *Senate Document No. 747, 61st Congress, 3rd Sess., Vol. I, p. 32 (1911).*

"The most serious problems of exclusion hearings are problems of personnel. * * * Every district apparently has its 'misfits'; we were several times told that the board of special inquiry is the best place to dispose of such persons. 'We tell them just to sit and keep their mouths shut'—a warning, needless to say, given not to the chairman of the board, who does practically all of the questioning, but to the second and third members." *Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service* (1940) p. 51.

This, then, is the background of Boards of Special Inquiry, reduced by administrative fiat of the Immigration Service, to two or even one Board member, instead of the three prescribed by statute.

If a typist-stenographer, or a clerk-stenographer in the employ of the Immigration Service is an immigrant official, so are the charwoman, messenger, handyman, chauffeur, janitor and all other menial employees who receive salary checks chargeable to the appropriations of the Immigration Service. Surely, Congress did not contemplate that the Attorney General could designate them as *immigration officials* qualified to sit on a Board of Special Inquiry with power to cast a vote to exclude the alien son of a world war veteran or to decide the legal issues involved in citizenship, and expatriation cases which come before such Board.

M. Louise Elliott was a Clerk-Stenographer with no qualifications other than that possessed by the ordinary stenographer or clerical employee in the Immigration Service. The Civil Service qualifications for a Clerk-Stenographer prescribe physical ability, and typing as well as stenographic experience and little more. (See: General Schedule 312—Clerk-Stenographer Subseries, Civil Service Commission.)

It is clear that the duties of a clerk-stenographer are merely clerical and were not entrusted with the sovereign power of government granted to immigrant officials who are authorized to arrest, exclude and deport aliens. (See: *Federal Register*, May 24, 1952, p. 4737 et seq.) The statute does not warrant appointment of such individual as a member of the Board even where permanent boards are not maintained and the regulations are in excess of the statutory authorization, *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919); *Manhattan Co.* v. *Commissioner*, 297 U. S. 129 (1936).

(B) *The Defective Composition of the Board Was Jurisdictional*

Attention will be directed in Point V to the unfairness of permitting two members of the Board to vote to exclude when they failed to hear testimony. At this point, we are concerned with the invalidity of the hearing because the Board included a Clerk-Stenographer as a voting member. The statute requires a board of three members (8 U. S. C. 153).

Congress has prescribed that interference by injunction with the enforcement of state or federal legislation pursuant to 28 U. S. C. 2282 requires "the adequate hearing and full deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure." *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 14 (1930). The decision of a court of less than three judges in such a case, is a nullity for want of jurisdiction. *Stratton* v. *St. Louis Southwestern, supra.*

In *General Broadcasting System* v. *Bridgeport B. Station*, 53 F. (2d) 664, 668, (D. Conn., 1931) it was said:

> "The field of the superior body being narrower under the express provisions of the act, the matter is one for the application of the rule that acts of an administrative body which do not clearly come within the powers granted to it by the legislature are void."

And in *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91, 100 (C. A. D. C., 1937) the court declared:

> "Proper administration of the law by governmental agencies such as the Communications Commission requires careful observance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify non-

> compliance with the law, or the substitution of fiat for adjudication."

In the instant case, the government disregarded the statutory mandate which required three immigrant officials to sit on a Board of Special Inquiry. Convenience of administration resulted in placing a stenographer on the Board as a third member—but such convenience cannot justify noncompliance with the law.

Contrary to the holdings below in the instant case that a Board of two validly appointed members complies with the statute, is the ruling in *U. S. ex rel. Pazos* v. *Redfern*, 180 Fed. 500 (C. C. E. D. La., 1910). There, the court held that where one of the three inspectors had also been the examining inspector who held the alien for a Board of Special Inquiry, he was ineligible to sit and the Board was improperly constituted. The Circuit Court in the *Redfern* case said:

> "It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power."

Because of the importance to the immigrant and to the country (*Senate Document* 747, 61st Cong. *supra*), Congress prescribed that a Board of three immigrant officials hear and deliberate the admissibility of aliens seeking entry to our shores. Deliberation by a chairman with two dummy yes-men who hear no oral testimony, ask no questions and exercise no independent judgment as the Clerk-Stenographer, M. Louise Elliott and Inspector Hamm did in the

instant case, was not the procedure contemplated by Congress. A board thus composed was not a three man board of immigration officials but rather a board of two immigration officials, and a stenographer. It violated the requirements of the statute and had no authority to act, and its decision was beyond its jurisdiction. Like a three judge court composed of less than the prescribed number, its decision is a nullity.

(C) *The Defective Composition of the Board Has Been Properly Raised*

The courts below held that (1) the Board was properly composed (2) that in any event two members voted to exclude and their decision was valid and (3) that this objection to the Board's composition must fail because it was not raised administratively (R. 10, 15). We believe that the Board was improperly composed and that the presence of two immigration officials did not satisfy the statute for the reasons noted above. We further submit, that the defect being jurisdictional may be raised at any time. No question is raised of exhaustion of administrative remedies. Petitioner pursued his case to the final authorities in the exclusion process—The Board of Immigration Appeals.

Jurisdictional defects may be raised for the first time, in the Supreme Court. *McGrath* v. *Kristensen*, 340 U. S. 162, 167. Certainly, where administrative remedies have been exhausted, as here, and the administrative agency has assumed jurisdiction, as here, jurisdictional defects may be raised in the District Court for the first time. Subsequent to the institution of suit herein and the decisions below, all issues were raised administratively. On August 11, 1953, the Board of Immigration Appeals ruled that they lacked merit. A copy of the Board's decision is annexed herein as Appendix "B".

In view of this administrative ruling, to postpone decision here until petitioner made the futile gesture of raising the objection administratively as he now has, would be to indulge in a "delaying formalism" and "idle form", a type of nugatory act with which courts dispense. *C. A. B.* v. *Modern Air Transport*, 179 F. (2d) 622, 625 (C. A. 2, 1950); *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. (2d) 165, 167 (S. D. N. Y. 1924); *Smith* v. *Cahoon*, 283 U. S. 553, 562 (1931); *Lovell* v. *City of Griffin*, 303 U. S. 444, 452-453 (1938); *Montana Nat. Bank of Billings* v. *Yellowstone Co.*, 276 U. S. 499, 505 (1928).

It should also be observed that the general rule is that jurisdictional defects may be raised judicially without exhaustion of administrative remedies. *Gonzales* v. *Williams*, 192 U. S. 1, 15 (1904); *United States* v. *Sing Tuck*, 194 U. S. 161 (1904); *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919); *Public Utilities Comm.* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943); *Federal Power Commission* v. *Panhandle Co.*, 337 U. S. 498, 515 (1949); *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, 197 (1913); *Varney, et al.* v. *Warehime, et al.*, 147 F. (2d) 238, 243 (C. A. 6, 1945); *U. S. ex rel. De Lucia* v. *O'Donovan*, 178 F. (2d) 876 (C. A. 7, 1950); *Chambers* v. *Robertson*, 183 F. (2d) 144, 146 (C. A. D. C. 1950); and cf. *U. S. ex rel. Bradley* v. *Watkins*, 163 F. (2d) 328 (C. A. 2, 1949).

Where objections must be raised administratively as a prerequisite to judicial action, Congress or the agency has expressly noted such fact in rules or statutory language. 15 U. S. C. 77(i)(a) (Securities Act); 29 U. S. C. 160(e) (National Labor Relations Act); *Democrat Printing Co.* v. *Federal Communications Commission* (F. C. C. Regulations, 202 F. 2d 298, C.A.D.C., 1952). There is no such provision either in the immigration statutes or regulations.

In *habeas corpus* proceedings, attack has been permitted

prior to the exhaustion of administrative remedies. *Gonzales* v. *Williams, supra* and *U. S. ex rel. Bradley* v. *Watkins, supra.* And see: 42 *Am. Juris.* 515, 517.

In divorce and denaturalization cases, collateral jurisdictional attack upon judicial decrees has been permitted without requiring prior objections in the proceedings under attack. *Sherrer* v. *Sherrer,* 334 U. S. 343 (1948); *Williams* v. *North Carolina,* 325 U. S. 226 (1945); *Bindczyck* v. *Finucane,* 342 U. S. 76 (1951); *United States* v. *Sotis,* 131 F. (2d) 783 (C. A. 7, 1942); *U. S. ex rel. Volpe* v. *Jordan,* 161 F. (2d) 390 (C. A. 7, 1947). Collateral jurisdictional attack upon administrative decrees should be no less sacrosanct than similar onslaughts upon judicial judgments.

Moreover, the government's delay in raising objection to petitioner's contention that the Board was defectively composed has prejudiced petitioner. The complaint and the pre-trial memorandum raised the objection of the Board's improper composition (R. 1, 5). Neither the answer nor the pretrial memorandum (R. 4, 5) raised the contention that this objection should have been raised administratively. It was therefore waived by the government. *Tucker* v. *Alexander,* 275 U. S. 228 (1927). The pre-trial memorandum controlled the future course of proceedings. *Rules of Civil Practice, Rule 12; Fowler, et al.* v. *Crown-Zellerbach,* 163 F. (2d) 773, 774 (C. A. 9, 1947); *King* v. *Edward Hines Lumber Co.,* 68 F. Supp. 1019 (D. Oregon, 1946); 1 *Barron & Holtzoff, Federal Practice and Procedure,* 964; *Nims, Pre-Trial,* 164. Had this issue been raised prior to trial, petitioner might have withdrawn his complaint and raised the objection administratively. It was improperly considered at the trial to petitioner's prejudice in violation of the pre-trial order.

Finally, it should be observed that where there has been a failure to exhaust administrative remedies, the procedure has not been to foreclose petitioner but to permit resort to

the administrative process. *S. S. W., Inc.* v. *Air Transport Association*, 191 F. (2d) 658 (C. A. D. C. 1951); *Gusik* v. *Schilder*, 340 U. S. 128 (1950).

Point IV

The Hearing Was Invalid for Failure to Comply With the Administrative Procedure Act

The complaint alleges (R. 2), and there is no dispute, that the Board of Special Inquiry was subject to the control of officers of the Immigration Service who were engaged in investigatory functions in violation of 5 U. S. C. 1004 and that the Board did not consist of hearing officers appointed pursuant to 5 U. S. C. 1010. The court below found that Boards of Special Inquiry are exempt pursuant to 5 U. S. C. 1006(a). Three questions are raised under this issue:

> (A) Are Boards of Special Inquiry subject to the hearing examiner requirements of 5 U. S. C. 1010 or within the exemption of 5 U. S. C. 1006(a)?
>
> (B) Does the exemption relieve Boards of Special Inquiry from the requirement of separating functions pursuant to 5 U. S. C. 1004(c)?
>
> (C) Are Boards of Special Inquiry exempt from 5 U. S. C. 1004(c) because exclusion cases involve initial applications for a license?

(A) *Hearing Examiners.* Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) requires special hearing examiners in cases of adjudications required by statute. These hearing examiners are to be assigned to cases in rotation, perform no inconsistent duties, and are to receive compensation prescribed not by the agency but by the Civil Service Commission. Section 7 (5 U. S. C. 1006) of the Act exempts from Section 11 "specified classes of proceedings . . . by or before boards or other officers specially provided for by or designated pursuant to statute."

The Section 7 exemption "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under Section 11 of this bill must do so." (Congressman Walter, *Senate Document No. 248*, 79th Congress, 2nd Session, p. 364. See also p. 268 and *Attorney General's Manual on Administrative Procedure Act*, pp. 71-72.)

56 *Yale Law Journal* 701 states:

> "The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that exemption can be granted to exclusion proceedings only on the basis that members of Boards of Special Inquiry are selected not from employees generally but because of their special qualifications. In the instant case, the immigrant inspectors who sat were not required to have any special training as lawyers but were merely required to pass a general aptitude test to qualify for their office. Under the regulations, 8 C. F. R. 60.27, patrol inspectors, and under 8 C. F. R. 60.29(c) anyone in and out of the government may serve on a Board of Spe-

cial Inquiry regardless of experience or training. The secretary who sat as a Board member merely had stenographic experience with the Immigration Service and listed herself as a Clerk-Stenographer.

As long as stenographers can sit as Board of Special Inquiry members—and this was the practice rather than the exception—as long as persons outside the Immigration Service may sit—individuals without special qualifications other than those possessed by employees generally, and non-employees, are performing the duties of hearing examiners. Boards so composed are not within the exemption of Section 7 of the Administrative Procedure Act. *U. S. ex rel. Saclarides* v. *Shaughnessy*, 180 F. (2d) 687 (C. A. 2, 1950), and *U. S. ex rel. Frisch* v. *Miller*, 181 F. (2d) 360 (C. A. 5, 1950) decided merely that Boards of Special Inquiry composed of specially qualified immigrant inspectors, as required by statute were exempt from the hearing requirements of the Administrative Procedure Act. Such is not the case here because of the improper composition of the Board. It is therefore submitted that Boards of Special Inquiry not composed of three specially qualified immigration officials are not within the exemption of 5 U. S. C. 1006(a).

(B) *The Exemption of 5 U. S. C. 1006(a) Does Not Relieve Boards of Special Inquiry from the Requirements of 5 U. S. C. 1004(c).* In its brief in the Supreme Court in *Sung* v. *McGrath*, 339 U. S. 33, the Government conceded that the exemption of 5 U. S. C. 1006(a) for certain statutory hearing officers "is not necessarily an exemption from all of the provisions of Sections 5, 7 and 8" of the Administrative Procedure Act (Brief, p. 45).

The *Attorney General's Manual on the Administrative Procedure Act* p. 72 states that in cases where the exemption of 7 (a) of the Administrative Procedure Act (5 U. S. C. 1006 (a)) is invoked, Section 5(c) (5 U. S. C. 1004(c)) requiring separation of functions is inapplicable only if in-

consistent with the exemption. The Government's brief in the *Sung* case states (p. 44):

> "Also, the express exemption of Section 7(a) for certain statutory hearing officers necessarily carries with it as much of an exemption from the general separation of functions requirement of Section 5(c) as is necessary to give effect to the express exception."

In the *Saclarides* and *Frisch* cases, *supra*, no question was raised or decided with regard to separation of functions. It is submitted that there is nothing in the immigration statute or 5 U. S. C. 1006(a) which warrants an exemption from 5(c) (5 U. S. C. 1004(c)) for Boards of Special Inquiry and that the hearing herein was invalid because of failure to separate functions.

(C) *Do Exclusion Cases Involve Initial Applications for a License Exempting Boards of Special Inquiry from 5 U. S. C. 1004(c).* Heretofore, the Government has acknowledged that the hearing before a Board of Special Inquiry is a hearing subject to 5 U. S. C. 1004(c) but has asserted the novel view that the admission of aliens "seemed to fall within the (exempting) provisions of section 5(c) relating to initial licenses" (*House Report 2140, 80th Congress, 2nd Session* p. 4). Until now, neither the Courts nor the Government have ever referred to the application for admission of an alien as an application for an "initial license." Generally the initial permission to enter the United States is granted by an American Consul abroad. The Immigration Service rechecks the alien's admissibility. There is no provision in our immigration statutes authorizing the Commissioner to issue licenses to aliens seeking admission to our shores. The statutes do not contemplate a licensing procedure. Furthermore, the Immigration Service does not treat an alien, once admitted, as though he has received a license. Section 9 of the Administrative Procedure Act requires notice to the licensee prior to revocation of a

license with an opportunity to achieve compliance with the requirements of law. On the contrary, the regulations governing visitors consider a visa cancelled forthwith upon evidence of an intention by words or action to violate the terms of admission. [Federal Register, May 15, 1948; 8 C. F. R. 119.5(c).]

In *Door* v. *Donaldson*, 195 F. 2d 764 (C. A. D. C. 1952) decided January 31, 1952, the Court said:

> "In our opinion, the Act exempts from the requirement of a full hearing, because they 'rest solely on inspections,' only decisions that turn either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts like the quality of tea or the condition of airplanes, as to which administrative hearings have long been thought unnecessary."

In line with this decision it seems clear that exclusion procedures do not turn on physical technical facts concerning which administrative hearings have long been thought unnecessary. On the contrary, administrative hearings have been granted in exclusion cases ever since the inception of our Federal immigration laws.

It is therefore submitted that the hearing herein violated the Administrative Procedure Act and was null and void. *Bogiatzis* v. *Hall*, 195 F. (2d) 661 (C. A. 4, 1952).

Point V

The Hearing Was Unfair.

The immigration statute 8 U. S. C. 152, 153 accords an arriving alien the privilege of a hearing and there is no dispute that he is entitled to a fair hearing. *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920); *U. S. ex rel. Brandt* v. *District Director*, 40 F. Supp. 371 (S. D. N. Y. 1941); *Monthly Review, Immigration and Naturalization Service*, February, 1947 p. 101. The appellant was not accorded a fair hearing.

The Changes in Board Personnel Rendered the Hearing Unfair

Chinese cases like the instant one, involving disputed paternity or identity, generally turn upon credibility of the applicant for admission to the United States. Determinations of credibility by the administrative agency are not upset by the courts upon the ground that those who heard the witness are in the best position to judge his credibility. *Gin Soon Ging* v. *Carmichael*, 123 F. (2d) 72 (C. A. 9, 1941); *Woon Sun Seung* v. *Proctor*, 99 F. (2d) 285 (C. A. 9, 1938); *Ex parte Keizo Kamiyama*, 44 F. (2d) 503 (C. A. 9, 1930).

In the instant case, the demeanor of the petitioner was observed administratively by one board member, Chairman Sinclair. The other board members (Hamm, and Clerk-Stenographer Elliott) were not present during any oral testimony whatsoever. Inspector Sinclair dominated the hearing, asked all questions, acted as prosecutor and judge and finally moved for the exclusion of appellant in which motion his straw board members concurred. (Minutes pp. 2, 13, 19, 23, 31) Throughout the written record prior to the appointment of board members Hamm and Clerk-Stenographer Elliott, Chairman Sinclair had spread his views upon the record as to petitioner's credibility. He continually commented that petitioner's answers were strange or unreasonable for an eighteen year old boy (Minutes pp. 3, 4, 6, 12, 18, 19, 22) and then recorded his opinion that petitioner misstated his age as eighteen instead of sixteen. His disbelief in the stated age of petitioner was only dissipated when the age of petitioner was verified by the Public Health Service at the chairman's request. (Minutes pp. 12, 23, 24, Exhibit 17) He refused to believe that petitioner's father was the man he claimed to be until proofs were received from Cuba (Minutes p. 24, Exhibit 22). And finally, he would not permit the uncorroborated testimony of peti-

tioner and his father to establish paternity (Minutes p. 31).

This atmosphere, created by the chairman who dominated the proceeding in accordance with immigration practice was hardly conducive to a fair hearing. And it was the chairman alone who observed petitioner as he testified and he alone was in a position to judge demeanor and credibility. Under such circumstances it was held in *Ex parte Lee Bock Fook*, 40 F. Supp. 937, 940 (S. D. Calif. 1941) that a hearing was rendered unfair. There the court said:

> "* * * we think it to be of more than passing significance that two of the members of the Board of Special Inquiry which sat at the first hearing did not attend either the second hearing or the third hearing. Granting that we may assume that the officials who replaced these two original members of the Board reviewed the record of what had heretofore transpired, nevertheless it can not be deemed that the substitute members did not hear the applicant or his alleged brother, Lee Book Toy, or the fellow villager, and hence they were hardly qualified to pass on the credibility of those witnesses or the weight to be given to their testimony."

See also:

U. S. ex rel. Ohm v. *Perkins*, 79 F. (2d) 533 (C. A. 2, 1935);

Buschbaum & Co. v. *F. T. C.*, 153 F. (2d) 85, (C. A. 7, 1946) reversed upon other grounds 328 U. S. 819;

Davis, Administrative Law, pp. 343, 345.

Although the Second Circuit has held that change in the composition of the Board does not render a hearing unfair, where an issue of law was involved *U. S. ex rel. Minuto* v. *Reimer*, 83 F. (2d) 166 and the Ninth Circuit has so held in cases involving credibility *Hom Moon Ong* v. *Nagle*, 32 F. (2d) 470 (C. A. 9, 1929), we submit that the better rule is expressed in *Davis, Administrative Law*, as follows at p. 343:

> "When demeanor of witnesses is unimportant, there is clearly no harm in permitting a substitution of one hearing officer for another at any stage of the proceedings, or permitting a decision to be made on the record without a report from the hearing officer. When demeanor of witnesses is important, deciding without taking that factor into account is undesirable and may be unfair. Demeanor may be taken into account either by permitting the hearing officer to make the decision, or by having the hearing officer make a report to the deciding officer or officers, as is traditionally done when an equity court appoints a special master. But if the judge or hearing officer dies or is replaced before making a report, then when demeanor is deemed to be of sufficient importance the testimony should be heard again."

In the instant case, demeanor of witnesses and credibility were of crucial importance. The substitution of hearing officers therefore constituted a fatal defect in the proceedings.

Conclusion

If *Heikkila* v. *Barber*, 345 U. S. 229 (1953) is not overruled, then the decision below should be reversed and remanded for dismissal solely upon jurisdictional grounds. If *Heikkila* v. *Barber* is reversed, as we suggest, then the decision below should be reversed upon the merits upon the ground that the petitioner was not accorded a hearing which was fair and in conformity with controlling statutes.

Respectfully submitted,

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APPENDIX "A"

STATUTES AND REGULATIONS

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

The Immigration Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. 232 provides as follows:

> "Notwithstanding any of the several clauses of Section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulatons, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States: * * *"

Section 16 of the Immigration Act of February 5, 1917, 39 Stat. 885, 8 U. S. C. 152 provides:

> "Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."

Section 17 of the Immigration Act of February 5, 1917, 39 Stat. 887; 8 U. S. C. 153 provides:

> "Boards of Special Inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. When in the opinion of the Attorney General the maintenance of a permanent board of special inquiry . . . is not warranted, regularly constituted boards may be detailed from other stations for temporary service at such port, or, if that be impracticable, the Attorney General shall authorize the creation of Boards of Special Inquiry by the immigration and naturalization officers in charge at such ports and shall determine what government officials or other persons shall be eligible for service on such boards. • • • In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General" • • •

Section 25 of the Immigration Act of 1917, 39 Stat. 893, 8 U. S. C. 164 provides in part:

> "The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any provisions of this Act."

8 C. F. R. 60.29 provides:

> "*Persons qualified as members of boards of special inquiry; oath.* In accordance with the provisions of

section 17 of the Immigration Act of 1917 (39 Stat. 887, 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

(a) Immigrant inspectors, including persons designated immigrant inspectors by Sec. 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I-266 before an immigrant inspector."

8 C. F. R. 60.27 provides:

"*Authority of patrol inspectors, special inspectors, naturalization examiners, and other officers to act as immigrant inspectors.* All persons serving under appointment heretofore or hereafter made as patrol inspectors, special inspectors, naturalization examiners, or other officers of the Immigration and Naturalization Service of a higher grade than patrol inspector, special inspector, or naturalization examiner are hereby designated immigrant inspectors without additional compensation. The work as immigrant inspectors shall be arranged by supervisory officers so as not to interfere substantially with the performance of the duties of the other positions."

Section 5 of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1004) provides:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

(c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or initial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) provides:

"In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission

independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-672, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable."

APPENDIX "B"

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Aug. 11, 1953.

File: A-6935914—San Francisco (1300-66270)
In the Matter of TOM WE SHUNG

IN EXCLUSION PROCEEDINGS

In behalf of Appellant: Jack Wasserman, Esquire, Warner Building, Washington 4, D. C. (Heard June 18, 1953).

In behalf of Service: Sidney B. Rawitz, Service Representative (Heard June 18, 1953).

This case is before us on counsel's motion for reconsideration dated May 1, 1953. A suit was filed on behalf of the alien in the United States District Court for the District of Columbia, seeking a declaratory judgment and review under the Administrative Procedure Act. The complaint was ordered dismissed,[1] and the judgment of the District Court was affirmed by the United States Court of Appeals on July 2, 1953.

The appellant, who claims birth in China on June 1, 1929, applied for admission to the United States on November 28, 1947 under the Act of December 28, 1945 (59 Stat. 659) as the alien son of an honorably discharged veteran of World War II who had been naturalized on December 16, 1946. The board of special inquiry found that he was not the son of the alleged father. On July 21, 1949 we dismissed the

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[1] *Tom We Shung* v. *McGrath et al.*, 103 F. Supp. 507.

appeal from the excluding decision and on December 1, 1949 we denied the motion for reopening and reconsideration submitted by the appellant's counsel.

Counsel concedes that a rehearing in an administrative proceeding lies within the discretion of the agency making the order and we find considerable merit also in the Service view that the objections which counsel now interposes should have been made when the case was before us in 1949. While we might deny counsel's motion on that basis, we have concluded, nevertheless, that the motion should be disposed of on the merits. Counsel's objections are that one of the board members was a clerk-stenographer; that there was a change in the personnel of the board between the taking of testimony and the final decision; that the board was not impartial and was subject to the control of those who investigate and prosecute and that the board of special inquiry did not comply with the Administrative Procedure Act.

With reference to the first objection, section 17 of the Immigration Act of 1917 contains nothing which would preclude the appointment of a clerk-stenographer as a member of a board of special inquiry. Under the regulations which were then in effect (8 C. F. R. 130.1 and 60.29), immigrant inspectors and persons designated as immigrant inspectors, and all other employees of the Service who were assigned to the duty of acting as secretaries of boards of special inquiry were designated as qualified and eligible to serve on such boards. The same question was raised in *Dong Ying Fun* v. *Nagle*, 5 F. (2d) 310 (C. C. A. 9, 1925), and the court held that the fact that one of the members of the board of special inquiry was a stenographer and kept the record of the proceedings and testimony was no ground for setting aside the findings of the board.

In connection with the objection relating to the change in the composition of the board of special inquiry, we note that L. H. Sinclair acted as chairman throughout the proceeding but that a substitution occurred with regard to the other two members when the hearing was resumed on February 24, 1949. At that time the two new members stated that they had familiarized themselves with all the evidence pre-

viously adduced in the case (p. 24). In *Dong Ying Fun* v. *Nagle, supra,* and in *Hom Moon Ong* v. *Nagle,* 32 F. (2d) 470 (C. C. A. 9, 1929), the courts rejected contentions based on changes which had occurred in the composition of boards of special inquiry between the commencement of the proceedings and the final disposition.

With regard to counsel's contention that the board of special inquiry was not impartial and his intimation that the board's decision was influenced by superior officers, we find no merit in these allegations and counsel has presented no supporting evidence. Likewise, we must reject his objection to the effect that the board of special inquiry did not comply with the Administrative Procedure Act in view of the decision in *U. S. ex rel Saclarides et al.* v. *Shaughnessy,* 180 F. (2d) 687, 689 (C. A. 2, 1950) in which the court held that exclusion proceedings were not subject to the hearing requirements of the Administrative Procedure Act. In addition, the Supreme Court has held that, where no objection was made before the agency to non-compliance with the Administrative Procedure Act, the validity of the agency's order cannot be judicially attacked on that ground. *United States et al.* v. *L. A. Tucker Truck Lines, Inc.,* 344 U. S. 33 (1952).

The objections which counsel seeks to raise before us were considered and disposed of adversely to him in the United States District Court. *Tom We Shung* v. *McGrath, et al., supra.* The Court of Appeals, in affirming that decision expressed agreement with the lower court's conclusions (1) that the board was properly constituted and, if not, the failure to make timely objection rendered that point unavailable and (2) that the hearings before the board were fair and its decision sufficiently supported by the evidence. The appellate court also stated that, while there might be a serious question as to the right of judicial review of an exclusion order, other than by habeas corpus, in view of the Supreme Court's decision in *Heikkila* v. *Barber,* 345 U. S. 229 (March 16, 1953), that question need not be considered since the appellant had been accorded the benefit of a full review and questions concerning the validity of the administrative proceedings had been considered and resolved

against him. In view of the foregoing, the following order will be entered.

ORDER: It is ordered that the previous orders of this Board relating to the appellant be and the same are hereby affirmed.

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Chairman.

(1382)